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*Special Counsel for the Trustee Areya Holder Aurzada*

**IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE NORTHERN DISTRICT OF TEXAS  
DALLAS DIVISION**

IN RE:	§	
	§	
DENNIS JAMES ROGERS II,	§	CASE NO. 22-30500-swe7
	§	(Involuntary Proceeding)
DEBTOR.	§	

**MOTION TO APPROVE SUBSTANTIVE CONSOLIDATION OF  
NONDEBTOR AFFILIATED ENTITIES WITH THE DEBTOR'S ESTATE**

**NO HEARING WILL BE CONDUCTED HEREON UNLESS A WRITTEN RESPONSE IS FILED WITH THE CLERK OF THE UNITED STATES BANKRUPTCY COURT AT 1100 COMMERCE STREET, DALLAS, TEXAS 75242 BEFORE CLOSE OF BUSINESS ON AUGUST 29, 2024, WHICH IS AT LEAST TWENTY-ONE (21) DAYS FROM THE DATE OF SERVICE HEREOF.**

**ANY RESPONSE SHALL BE IN WRITING AND FILED WITH THE CLERK, AND A COPY SHALL BE SERVED UPON COUNSEL FOR THE MOVING PARTY PRIOR TO THE DATE AND TIME SET FORTH HEREIN. IF A RESPONSE IS FILED, A HEARING MAY BE HELD WITH NOTICE ONLY TO THE OBJECTING PARTY.**

**IF NO HEARING ON SUCH NOTICE OR MOTION IS TIMELY REQUESTED, THE RELIEF REQUESTED SHALL BE DEEMED TO BE UNOPPOSED, AND THE COURT MAY ENTER AN ORDER GRANTING THE RELIEF SOUGHT OR THE NOTICED ACTION MAY BE TAKEN.**

**COMES NOW**, Areya Holder Aurzada (“Trustee” or “Plaintiff”) in her capacity as Chapter 7 Trustee for Dennis James Rogers II (“Debtor” or “Rogers”) and files this her *Motion to Approve Substantive Consolidation of Nondebtor Affiliated Entities with Debtor’s Estate* (the “Motion”) and would respectfully show the Court as follows:

**I. BACKGROUND**

1. On March 22, 2022, Creditors Debra A. Van Cleve, Russell Van Cleve, Angela Garbiso and Steven A. Webster (“Petitioning Creditors”) filed a Petition for Involuntary Relief. [Dkt. 1]. On March 28, 2022, this Court granted Petitioning Creditors’ Emergency Motion for Entry of an Order (I) Appointing an Interim Trustee under 11 U.S.C. § 303 (G) and (II) Granting Emergency Relief [Dkt. 16]. On April 26, 2022, the Court entered an Order for Relief in an Involuntary Case [Dkt. 33]. The Trustee continues to serve as the permanent Chapter 7 Trustee.

2. On May 11, 2022, the Debtor filed, among other things, his Summary of Assets and Liabilities [Dkt. 47]. On June 23, 2022, the Debtor appeared and testified at his 341(A) Creditor’s Meeting. On August 11, 2022, the Debtor filed his Amended Bankruptcy Schedule C [Dkt. 112]. In the Summary of Assets and Liabilities and attached schedules, the Debtor identified approximately \$19,000,000.00 of debts from various creditors and less than \$2,000,000.00 of assets, the bulk of which the Debtor claims as exempt.

3. The Debtor has plead guilty to securities fraud and admitted that he used funds from investors to pay other investors, purchase real estate and pay his personal expenses. See **Exhibit 1** Factual Resume of Dennis Rogers in Case No. 3-24CR0170-K.

## **II. ARGUMENT AND AUTHORITIES**

### **A. The Standard for Substantive Consolidation.**

4. The Bankruptcy Code does not expressly provide for substantive consolidation; instead, the authority of the Court arises from its equitable powers under section 105 of the Bankruptcy Code. *In re ADPT DFW Holdings, LLC*, 574 B.R. 87, 93 (Bankr. N.D. Tex.) (Jernigan, J.); *In re Permian Producers Drilling, Inc.*, 263 B.R. 510, 517 (W.D. Tex. 2000). A bankruptcy court's ability to order substantive consolidation has its roots in the Supreme Court decision of *Sampsell v. Imperial Paper & Color Corp.*, 313 U.S. 215, 219 (1941), where the Supreme Court recognized that the consolidation of different but related estates was a vital tool in fulfilling a fundamental purpose of bankruptcy proceedings. "The power of the bankruptcy court to subordinate claims or to adjudicate equities arising out of the relationship between several creditors is complete." *Id.*

5. Substantive consolidation combines two or more debtors into a single pool from which the claims are paid ratably. *Clyde Bergemann, Inc. v. Babcock and Wilcox Co. (In re Babcock & Wilcox Co.)*, 250 F.3d 955, 959 n.5 (5th Cir. 2001); *ADPT*, 574 B.R. at 91. The assets and liabilities of separate bankruptcy estates are combined and treated as if they belong to one entity. *Babcock and Wilcox*, 250 F.3d at 959.

6. The Fifth Circuit has long held that bankruptcy courts have the authority to substantively consolidate cases. *S.I. Acquisition v. Eastway Delivery Serv. (In re S.I. Acquisition)*, 817 F.2d 1142, 1144 n.2 (5th Cir.1987). "[A] survey of case law and legal scholarship indicates a general agreement with the proposition that a bankruptcy court has the authority to order substantive consolidation." *Permian Producers*, 263 B.R. at 516 (citations omitted).

7. The legal standards for substantive consolidation are highly fact specific and made on a case by case basis. *ADPT*, 574 B.R. at 93-94; *Permian Producers*, 263 B.R. at 516. Two separate

tests have evolved: one based on reviewing several factors to determine if consolidation is appropriate; the other, balancing the impact on creditors versus the benefits of consolidation. *Permian Producers*, 263 B.R. at 517-18. The Fifth Circuit has not adopted either test. *ADPT*, 574 B.R. at 94; *In re Introgen Therapeutics, Inc.*, 429 B.R. 570, 582 (Bankr. W.D. Tex.).

The factors cited in *Permian Producers* are:

- (a) the degree of difficulty in segregating and ascertaining individual assets and liabilities;
- (b) the presence or absence of consolidated financial statements;
- (c) the profitability of consolidation at a single physical location;
- (d) the commingling of assets and business functions;
- (e) the unity of interests and ownership between the various corporate entities;
- (f) the existence of parent and intercorporate guarantees on loans; and
- (g) the transfer of assets without formal observance of corporate formalities.

*Permian Producers*, 263 B.R. at 518.

8. The factor test has been reduced from a long laundry list to two critical factors: (1) whether creditors dealt with the entities as a single economic unit and did not rely on their separate identity in extending credit; *or* (2) whether the affairs of the debtors are so entangled that consolidation would benefit all creditors. *ADPT*, 574 B.R. at 95 (citing *In re Augie/Restivo Baking Co.*, 860 F.2d 515, 519 (2d Cir. 1988)); *Introgen Therapeutics*, 429 B.R. at 583 (same). The presence of either factor is sufficient to order substantive consolidation. *ADPT*, 574 B.R. at 96 (citing *Augie/Restivo*, 860 F.2d at 519); *In re E'Lite Eyewear Holding*, 2009 WL 349832, \*3 (Bankr. E.D. Tex. 2009).

9. The balancing test requires a showing of identity between the entities to be consolidated, that the consolidation is necessary to prevent harm or prejudice, *or* a general benefit from the consolidation. *Introgen*, 429 B.R. at 584.

10. Courts are divided on the substantive consolidation of a debtor with a nondebtor. “[A]s careful as the courts must be in allowing substantive consolidation of *debtors* to occur ..., the caution must be multiplied exponentially in a situation where a consolidation of a debtor’s case with a non-debtor is attempted.” *Morse Operations, Inc. v. Robins LeCocq. Inc. (In re Lease-A-Fleet, Inc.)*, 141 B.R. 869, 872 (Bankr.E.D.Pa.1992) (emphasis in original).

11. Exercising this caution and applying the factors in *Permian* and/or the simplified two factor test, numerous courts have ordered substantive consolidation with nondebtor entities. *See, e.g., In re E’Lite Eyewear Holding*, 2009 WL 349832, \*3 (Bankr. E.D. Tex. 2009) (discussing substantive consolidation with nondebtor entities).

**B. The Recognized Factors Support Substantive Consolidation.**

12. In 2017 and 2018, Rogers set up at least five (5) different affiliated corporations – Organ Mountain Energy, LLC; OMTc, Inc.; Nomad Development, LLC; Bootstrap Ventures, LLC, and Push Start Industries, LLC (collectively, the “Affiliated Entities”).<sup>1</sup> Based on the Trustee’s due diligence, the Debtor’s 341 testimony, and review of bank records and other documents, each Affiliated Entity functioned as an alter ego of Dennis Rogers. In other words, each Affiliated Entity was organized and operated as a mere tool or business conduit for Rogers, there was such unity between the Affiliated Entities and Rogers that the separateness of the corporations ceased, and holding only the corporations liable would result in an injustice. *See, e.g., Durham v Accardi*, 582 S.W.3d 179, 185 (Tex. App.-Houston [14<sup>th</sup> Dist.] 2019, no pet.).

13. Rogers was the sole owner of the Affiliated Entities. Investigation to date indicates no employees in any of the Affiliated Entities. Rogers is the only party appearing in records reviewed

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<sup>1</sup> Affiliated Entities are referred to as “Shell Entities” in the Amended Complaint.

who made any decision on behalf of any Affiliated Entity. Rogers guaranteed the debts of all Affiliated Entities.

14. Other than the original operating agreements, there are only a handful of corporate records of any type. Indeed, for some of the Affiliated Entities there are no records other than what appears on the Secretary of State website.

15. The banking records indicate that there was literally no distinction between or among the deposits and distributions made from Rogers' personal accounts and the accounts of the Affiliated Entities. Rogers and the Affiliated Entities used six different banks or brokerage firms. Rogers and the Affiliated Entities had 28 traditional banking accounts and another 20 brokerage accounts. On a weekly if not daily basis, Rogers transferred money between Affiliated Entity accounts and his personal account. The Affiliated Entities paid each other's debts and expenses and paid Rogers' debts and expenses. There is no evidence that these transfers were accounted for by any of the Affiliated Entities.

16. The Affiliated Entities used a variety of physical addresses, but used the same addresses at the same points in time.

17. If the ability of courts to substantively consolidate nondebtors with the debtor's estate is viable (and it is) it should apply here under any test. To hold otherwise prejudices the creditors. By way of example, and without limitation, if the Trustee is limited to avoiding fraudulent transfer actions coming from the Debtor only, and not fraudulent transfers coming from his alter ego wholly owned subsidiaries, the Trustee's avoidance powers to benefit all creditors are impaired.

WHEREFORE, PREMISES CONSIDERED, the Trustee requests that this Court order the substantive consolidation of the Affiliated Entities with the Debtor's Estate effective as of the date of the filing of the Involuntary Petition in this case and grant the Trustee such other and further relief to which she may be justly entitled.

Dated: August 8, 2024

Respectfully submitted,

By: /s/ David B. Miller

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**CERTIFICATE OF CONFERENCE**

I hereby certify that I reasonably anticipate that the number of opposing parties may be too numerous to contact prior to filing this Motion.

By: /s/ David B. Miller

David B. Miller

**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the foregoing document was served concurrently with the filing of the same by (a) the Court's CM/ECF noticing system upon all persons who have filed ECF appearances in this case, including counsel of record for the Debtor, the Trustee, the Office of the United States Trustee, and all persons and entities requesting notice under L.B.R. 2002-1(j), and (b) first class mail, postage prepaid, on the persons and entities set forth on the

attached service list. The service list is omitted from service copies to avoid unnecessary copying and postage charges, but a copy can be obtained free of charge by making a written request to Kathleen Yant, 300 N. Coit Road, Suite 1125, Richardson, Texas 75080, Fax: 972-479-1113, [kathleen@schneidlaw.com](mailto:kathleen@schneidlaw.com).

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